01-18-00538-CR

In the
Court of Appeals
For the First Judicial District of Texas
At Houston

No. 2167075
In the County Criminal Court at Law No. 6
of Harris County, Texas

RICARDO ROMANO
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39, the State does not request oral argument.

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

On August 24, 2017, the appellant was charged by information with indecent exposure committed on August 23, 2017. (CR. – 7). Following a trial, the court found the appellant guilty of the charged offense on May 18, 2018. (CR. – 61). The court sentenced him the same day to three days in jail. *Id*. The trial court certified the appellant's right to appeal on May 18, 2018; the appellant timely filed notice of appeal on June 12, 2018. (CR. – 54, 64-70).

STATEMENT OF FACTS

On August 23, 2017, at around noon, Houston Police Department Officer Ryan Gardiner was on mounted patrol in Memorial Park when he saw the appellant park, exit, and move around the outside of his vehicle. (I RR. – 11-13); (State's Ex. 2). At that point, Gardiner "saw [the appellant] pull the top [of his shorts] down with one hand; and [sic] the other hand, [Gardiner] saw him start masturbating." (I RR. – 13-14). By "masturbating," Gardiner meant that the appellant "was stroking his penis with his hand." (I RR. – 14). The appellant claimed "that he was trying to use the bathroom[,]" but there was no urine on the ground, a restroom was directly across

the street from the appellant's location, and Gardiner "saw that [the appellant] was not using the bathroom, that he was masturbating." (I RR. – 15-16). Gardiner was "sure that [the appellant] was masturbating[.]" (I RR. – 16).

REPLY TO APPELLANT'S FIRST POINT OF ERROR

In his first point of error, the appellant complains that the evidence was insufficient to sustain his conviction for indecent exposure. (Appellant's Brief at 7). Specifically, the appellant argues that the evidence was insufficient to show exposure with the requisite intent and recklessness. (Appellant's Brief at 8-10). But the appellant's argument fails because a rational fact-finder could have found the appellant guilty of indecent exposure based on the evidence presented. The appellant's first point of error should therefore be overruled.

A. Standard of review for challenges to the sufficiency of the evidence

The standard of review in the present case is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt the elements of the offense of indecent exposure, namely, that the appellant unlawfully exposed his genitals with the intent to arouse and gratify his sexual desire, and that he was reckless about whether another person was present who would be offended or alarmed by the exposure. (CR.

– 7); TEX. PENAL CODE § 21.08(a) (West 2017); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The fact-finder judges the credibility of witnesses and may find credible all, some, or none of the testimony those witnesses give. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). It is the duty of the fact-finder "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. It has long been settled in Texas courts that the testimony of one witness, if believed beyond a reasonable doubt, is sufficient to support a fact. *See Palmer v. State*, 244 S.W. 513, 513 (Tex. Crim. App. 1922) (stating "one-witness rule"). And the testimony of one witness, if believed beyond a reasonable doubt, is sufficient to support a conviction where it proves every element of the offense. *See Lee v. State*, 206 S.W.3d 620, 623 (Tex. Crim. App. 2006).

B. The evidence is sufficient—based on Gardiner's testimony, a rational fact-finder could have found: (1) that the appellant exposed his genitals with the intent to arouse and gratify his sexual desire; and (2) that the appellant was reckless about whether another person was present at a public park.

In his first point of error, the appellant claims that the evidence failed to support the verdict as to: (1) whether the appellant exposed his genitals with the intent to arouse and gratify his sexual desire; and (2) whether the appellant was reckless about the possible presence of another person at the public park where he

was arrested. (Appellant's Brief at 8, 10). In particular, the appellant relies upon Gardiner's body camera footage, which was admitted by the State, to support his position that "Gardiner was too far away from appellant to see what he was doing and…could not have seen that appellant was masturbating, even if he was." (Appellant's Brief at 9-10); (State's Ex. 2).

But the video is not so conclusive. The footage, for example, is not recorded from Gardiner's eye level; it does not represent an accurate depiction of what Gardiner could see from his vantage point. (State's Ex. 2). And the trial court, as fact-finder, was entitled to believe Gardiner's detailed testimony. *See Jackson*, 443 U.S. at 319 (holding that it is the fact-finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."). The evidence in this case was therefore sufficient to sustain the conviction, and the appellant's first point of error should be overruled.

During his own testimony, the appellant admitted to all elements of the offense other than intent and recklessness. (I RR. – 64-68). He testified that he was "in a park, which is a public place," and that, while there, he exposed his penis. (I RR. – 64). But he claimed that the public nature of the park did not matter, saying, "When I arrived, there was nobody there." *Id*. As the appellant notes in his brief, he also testified that he "pulled out [his] penis" to urinate, not to masturbate. (I RR. – 66).

The appellant claims that Gardiner's body camera footage "depicts that [Gardiner] did not, in fact, see that appellant was masturbating[]" because "Gardiner was too far away" and "could not have seen that appellant was masturbating[.]" (Appellant's Brief at 9-10); (State's Ex. 2). According the appellant, "the video rebuts Gardiner's testimony and establishes that no rational trier of fact could have found *beyond a reasonable doubt* that appellant exposed" his penis with the requisite intent. (Appellant's Brief at 9) (emphasis in original). To support his position, the appellant cites *Beasley v. State*, 906 S.W.2d 270, 272 (Tex. App.—Beaumont 1995, no pet.); (Appellant's Brief at 10). But in *Beasley*, the complainant testified, "I don't know if [the appellant] had his hand on his penis or if he was masturbating[,]" which is a far cry from the testimony in this case. *Beasley*, 906 S.W.2d at 272.

Courts review the sufficiency of the evidence in the light most favorable to the verdict to determine whether any rational judge could have found the elements of the crime beyond a reasonable doubt. *Hefner v. State*, 934 S.W.2d 855, 857 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Jackson*, 443 U.S. at 319. Here, Gardiner's testimony was unequivocal. He said, "I saw [the appellant] pull the top [of his shorts] down with one hand; and the other hand, I saw him start masturbating." (I RR. – 13-14). And to remove any doubt about what he meant by "masturbating," Gardiner testified that the appellant "was stroking his penis with his hand." (I RR. – 14). To answer any concern that the appellant was merely urinating,

Gardiner stated that he "saw that [the appellant] was not using the bathroom, that he was masturbating." (I RR. – 15-16). Gardiner was "sure that [the appellant] was masturbating[.]" (I RR. – 16, 46-47).

Although the appellant claims that Gardiner's body camera footage affirmatively rebuts Gardiner's testimony, in part because "his limited sight line…was obscured by tree branches and bushes," the footage does not show "that the evidence is so contrary to the overwhelming weight of the evidence as to be manifestly unjust." *Young v. State*, 976 S.W.2d 771, 774 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd); (Appellant's Brief at 9). The trial court, as the fact-finder in this case, was "the sole judge of the credibility of the witnesses." *Young*, 976 S.W.2d at 774-75. As such, the court had the duty and ability to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

The trial court may have considered the fact that the body camera captured the view from a different sight line than Gardiner's eyes. (State's Ex. 2). And if the court believed Gardiner beyond a reasonable doubt, as the verdict indicates, Gardiner's testimony alone is sufficient to support the conviction because it proved every element. *Lee*, 206 S.W.3d at 623. Because Gardiner's testimony supported the court's verdict as to the appellant's intent, the evidence is sufficient to support the appellant's conviction.

The appellant also argues that "[t]he evidence was undisputed that no one else was present other than Gardiner, who concealed himself behind trees and bushes[,]" but he misses the point—Gardiner was present when the appellant exposed himself. (Appellant's Brief at 11); (I RR. – 13-16). The appellant was therefore reckless when he "pulled out [his] penis" in a public park. (I RR. – 66). A person acts recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. TEX. PENAL CODE § 6.03(c) (West 2017). The appellant maintains that "no one would have been aware of the risk…that another person would be 'present' in a public park by hiding behind trees and bushes." (Appellant's Brief at 13). But that is exactly what an ordinary person would regard as a risk at a public park.

The facts of this case are similar to those in *Young*, 976 S.W.2d at 772-75. In *Young*, a deputy patrolling a public rest stop observed the appellant and another man go through a hole in a fence into the park area of the rest stop. *Id*. at 772. The deputy followed the men and observed the appellant with his pants unzipped and his penis in plain view. *Id*. This Court found that these facts constituted "sufficient evidence that appellant recklessly exposed himself" to the deputy. *Id*. at 774 ("A rational fact finder could have concluded that appellant was reckless, because, as far as he knew, other people, including [the deputy], could have been in the park to explore the

trails."). And while the appellant focuses in his brief on Gardiner's location, his own location in this case was not behind a fence, in the bushes, or off the roadway at night. The appellant was in a public parking area in broad daylight at midday. (I RR. – 47, 59); (State's Ex. 2). Even though "there was nobody in the parking lots in front of [him]," the appellant admitted, "I suspected someone was behind the bushes[.]" (I RR. – 61). The appellant recklessly exposed his penis with the requisite intent. The evidence is sufficient to support his conviction; the appellant's first point of error should therefore be overruled.

REPLY TO APPELLANT'S SECOND POINT OF ERROR

In his second point of error, the appellant complains that the trial court erred by allowing Gardiner's testimony that Gardiner did not believe the appellant when the appellant claimed that he was merely urinating, not masturbating. (Appellant's Brief at 14). In support of this claim, the appellant relies on Rule 702. TEX. R. EVID. 702; (Appellant's Brief at 16). But Rule 702 is inapplicable because Gardiner was not testifying as an expert. *See* TEX. R. EVID. 702 ("Testimony by Expert Witnesses"). Rule 701 applies to Gardiner's testimony, and it allows opinion testimony by lay witnesses. *See* TEX. R. EVID. 701 ("Opinion Testimony by Lay Witnesses"). And because Gardiner's testimony complied with Rule 701, the trial court did not err by allowing it. Even had the trial court erred, such an error would

be harmless—the revelation that the officer who arrested the appellant found the appellant lacking in credibility concerning the offense could have had little, if any, impact on the court. The appellant's second point of error should therefore be overruled.

A. Standard of review for the admission of evidence

Courts review a trial court's decision to admit evidence under an abuse of discretion standard, upholding the trial court's decision if it is within the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 153-54 (Tex. Crim. App. 2001) (internal citations omitted); *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). A trial court has wide latitude in determining what evidence is relevant to a particular case. *Contreras v. State*, 59 S.W.3d 362, 365 (Tex. App.—Houston [1st Dist.] 2001, no pet.). An appellate court will reverse a trial court's decision to admit evidence only for an abuse of discretion. *Ho v. State*, 171 S.W.3d 295, 302 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

If there is evidence supporting the trial court's decision to admit evidence, there is no abuse, and the appellate court must defer to that decision. *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). As long as the court's decision is correct on any theory of law applicable to the case, the court's ruling will be sustained. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). "This is

especially true with regard to the admission of evidence." *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

B. The trial court did not err because Gardiner's testimony was admissible under Rule 701.

The appellant contends that the trial court erred by admitting an improper opinion. (Appellant's Brief at 15). Specifically, the appellant objects to Gardiner's statement that Gardiner did not believe the appellant when the appellant told Gardiner that he had been urinating rather than masturbating beside his car. (Appellant's Brief at 15); (I RR. – 15). The pertinent part of Gardiner's testimony was as follows:

PROSECUTOR:	Did you tell [the appellant] what he was under arrest for?
GARDINER:	Yes; Indecent Exposure.
PROSECUTOR:	How did the [appellant] respond to this news?
GARDINER:	He denied it and said that he was trying to use the bathroom.
PROSECUTOR:	Did you believe this?
GARDINER:	No.
DEFENSE COUNSEL:	Objection, Your Honor, to his belief.
COURT:	Overruled.
PROSECUTOR:	Why didn't you believe this?

GARDINER: Because I saw [the appellant]; and I saw that he was not using the bathroom, that he was masturbating.

PROSECUTOR: Were there any other clues to indicate that he was not using the restroom?

GARDINER: There was no urine on the ground, and there was also a restroom directly across the street from where we were at.

…

PROSECUTOR: Would you have been able to see any liquid on the ground?

GARDINER: Yes.

(I RR. – 15-16).

In support of his position, the appellant cites, among other cases, *Schutz v. State*, 957 S.W.2d 52, 59-60, 70, 73 (Tex. Crim. App. 1997); (Appellant's Brief at 16). But *Schutz*, as the appellant notes, concerns the testimony of an expert witness. *Id*. Here, Gardiner was not testifying as an expert. The State did not qualify him as an expert. And it is not clear from the record in what field one might be qualified as an expert to give an opinion on whether a man was masturbating or urinating. Such an opinion goes to the heart of what separates an expert and a lay witness.

Although defense counsel objected to Gardiner giving his opinion, it is well-settled that both expert and lay witnesses can offer opinion testimony. *Osbourn*, 92 S.W.3d at 535. Rule 701 covers a witness who saw or participated in the events

about which he or she testifies, while Rule 702 allows an expert—who may not have direct knowledge of the events—to testify to theories, facts, and data used in his or her area of expertise. *Id*. at 535-36. "A witness can testify in the form of an opinion under Rule 701 if the opinions or inferences are (a) rationally based on his or her perceptions and (b) helpful to the clear understanding of the testimony or the determination of a fact in issue." *Id*. at 535 (citing *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997)). And "the witness's testimony can include opinions, beliefs, or inferences as long as they are drawn from his or her own experiences or observations." *Id*.

Although Gardiner testified as a police officer, he did not testify as an expert. *See Osbourn*, 92 S.W.3d at 536-37 (holding officer's testimony that she smelled marijuana in vehicle was admissible as lay opinion testimony). It does not take an expert to determine whether someone is urinating or masturbating. And Gardiner's belief that the appellant was not urinating was based on his observations that there was no urine on the ground. (I RR. – 15-16). Gardiner also noted that a restroom—a location more commonly associated with urination than the side of one's vehicle—was located directly across the street from the appellant. *Id*. Finally, Gardiner based his opinion on the fact that the appellant had been "stroking his penis with his hand." (I RR. – 14).

Gardiner's testimony about his belief was "helpful to…the determination of a fact in issue"—whether the appellant was masturbating or urinating. *See Osbourn*, 92 S.W.3d at 535 (allowing opinions under Rule 701 where based on perceptions and helpful to the determination of a fact in issue). While the appellant cites a number of cases noting that a witness may not testify to his or her opinion on the ultimate issue of guilt or innocence, Gardiner offered no such testimony. (Appellant's Brief at 16). Gardiner gave an opinion helpful to the court's determination of a fact in issue, which was permissible under Rule 701. The trial court therefore did not err by allowing the testimony.

Assuming *arguendo* that the trial court erred, the error was harmless. Testimony from the arresting officer that he believed the appellant, whom he had arrested for indecent exposure, had not been merely urinating could hardly have come as a surprise to the trial court. The trial court did not err, and even if the court erred, the error was harmless. *See Taylor v. State*, 774 S.W.2d 31, 34 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (holding error harmless where officer's testimony admitted in error, but conclusion expressed "was a reasonable inference from his other testimony and the jury could not logically have reached a different conclusion."); *see also Klein v. State*, 662 S.W.2d 166, 168 (Tex. App.—Corpus Christi 1983, no pet.) (holding error harmless where witness stated legal conclusion, but conclusion expressed by witness "was a reasonable inference from his prior

testimony…and the jury could not have logically reached a different conclusion."). The appellant's second point of error should therefore be overruled.

REPLY TO APPELLANT'S THIRD POINT OF ERROR

In his third point of error, the appellant claims that defense counsel rendered ineffective assistance. (Appellant's Brief at 19). Specifically, the appellant complains that counsel "mentioned, elicited, and failed to object to testimony" concerning the appellant's prior conviction for indecent exposure. *Id*. But defense counsel's performance was not deficient—he had a valid strategic reason to raise the issue. And the appellant suffered no prejudice in a court trial where the charging instrument itself included a reference to the prior conviction. (CR. – 7). The appellant's third point of error should therefore be overruled.

A. Standard of review for claims of ineffective assistance of counsel

The standard by which counsel's performance shall be judged is provided in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *See also Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (holding that the standard is the same in both federal and state cases). To show ineffective assistance of counsel, the appellant must prove by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) the performance so prejudiced the defense that

the trial was not fair, that is, the result was unreliable. *Strickland*, 466 U.S. at 687; *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). Should the appellant fail to show that defense counsel's performance was either deficient or sufficiently prejudicial, the claim is defeated. *Rylander v. State*, 101 S.W.3d 675, 687 (Tex. Crim. App. 2003). If the appellant fails as to one prong, the court need not even consider the other prong. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

To show that counsel's performance was deficient is to show that it "fell below an objective standard of reasonableness based on prevailing professional norms." *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Courts accord defense counsel "wide latitude . . . in making tactical decisions[,]" and the appellant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 688 (citing *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955)); *see also Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) ("Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance.").

To demonstrate prejudice, the appellant must show "a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is

defined as "a probability sufficient to undermine confidence in the outcome." *Id*. It is not sufficient to merely show in hindsight that there may have been a strategy that could have produced a preferable outcome. *See Id.* at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.").

Any claim that defense counsel provided ineffective assistance must be supported by the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (*abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249, 270-71 (Tex. Crim. App. 1998)). Where, as in the present case, the appellant filed no motion for new trial, there is little in the record to show the strategy of defense counsel or upon which to base a claim that such strategy was deficient. For this reason, "[d]irect appeal is usually an inadequate vehicle for raising such a claim . . . ." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). If defense counsel has not had the chance to explain his or her actions and strategy, "the appellate court should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id.* at 593 (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

B. Counsel's performance was not deficient for raising or failing to object to testimony concerning the appellant's prior conviction for indecent exposure, and the appellant suffered no prejudice.

In his third point of error, the appellant claims that his trial counsel was deficient because he "mentioned, elicited, and failed to object to testimony" concerning the appellant's prior conviction for indecent exposure. (Appellant's Brief at 19). Comments related to the appellant's prior history were made on several occasions during the court trial. Defense counsel first raised the issue when he asked Gardiner if he knew that the appellant was previously arrested at a bathroom. (I RR. – 43). The State eventually followed counsel's question by asking Gardiner whether he had known that the appellant had a prior conviction for indecent exposure when Gardiner had arrested the appellant. (I RR. – 47-48). Gardiner had not known until after he had cleared the scene. (I RR. – 48).

During the appellant's testimony, the appellant gave his prior conviction as the reason that he had not wanted to go into the nearby bathroom to urinate instead of urinating in public beside his car. (I RR. – 63). Counsel asked the appellant, "So, why were you wanting avoid [sic] the bathroom?" *Id*. And the appellant, who had earlier acknowledged having seen a "news clip" about the Memorial Park bathrooms, responded, "Well, prior conviction. I just—I wanted nothing to do with that kind of bathroom." *Id*.

This Court has previously found that the admission of prior convictions while attempting to portray the defendant as truthful was a reasonable trial strategy and did not amount to ineffective assistance. *Scope v. State*, 01-08-00824-CR, 2010 WL 3220627, *7 (Tex. App.—Houston [1st Dist.] Aug. 12, 2010, pet. ref'd) (mem. op., not designated for publication). By introducing evidence of the appellant's prior conviction in the present case, trial counsel may have sought to lend credibility to the appellant, who claimed that he chose to urinate beside his car because he did not wish to enter a nearby restroom known to be a meeting place for individuals interested in exposing themselves to each other. (I RR. – 63).

Defense counsel in this case had no chance to explain his or her actions and strategy. And on such a record, appellate courts "should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Menefield*, 363 S.W.3d at 593 (quoting *Garcia*, 57 S.W.3d at 440). Because defense counsel here had a strategic reason for eliciting testimony about the appellant's prior conviction for indecent exposure, his performance was not deficient, and the appellant's third point of error should be overruled.

Even assuming *arguendo* that the appellant has shown that trial counsel's performance was deficient, the appellant must also show that he suffered prejudice. That is, the appellant must show "a reasonable probability that, but for his counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id*.

The appellant claims on appeal that defense counsel's "unreasonable conduct…allowed the court to learn that appellant was previously convicted of indecent exposure" and "devastated the defense." (Appellant's Brief at 26). But to the contrary, nothing done by any of the parties with regard to the appellant's prior conviction undermines confidence in the outcome. At the beginning of the court trial, the trial court took judicial notice of the court's file and "all previous motions." (I RR. – 6). The court's file would have certainly included a copy of the charging instrument. And the information included a paragraph noting, "Before the commission of the offense alleged above, on February 25, 1999, in Cause No. 9810010, in the County Criminal Court at Law No. 8 of Harris County, Texas, the Defendant was convicted of the misdemeanor offense of Indecent Exposure." (CR. – 7).

The fact-finder in this case was the trial court, before whom the matter had been pending since August 24, 2017. (CR. – 7). And unlike a jury, the trial court already had knowledge of the appellant's prior conviction from the information itself. (I RR. – 6). In his brief, the appellant points out a motion in limine filed by defense counsel as well as a notice of intent to use the prior conviction filed by the

State. (Appellant's Brief at 19); (CR. – 35, 50). Having taken judicial notice of "all previous motions," the court was aware of the prior conviction through these filings as well. (I RR. – 6). And, having ruled on the defense motion in limine, the court was reminded of the appellant's conviction yet again. (CR. – 55-58). The appellant suffered no prejudice as a result of defense counsel's mention of his prior offense because the trial court already had knowledge of the appellant's prior conviction for indecent exposure from several sources. The appellant therefore fails to show both that counsel's performance was deficient and that he suffered prejudice because of it. The appellant's third and final point of error should be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and the conviction should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 5,577 words in it; and (b) the undersigned attorney will request that a copy of the foregoing instrument be served by efile.txcourts.gov to:

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